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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

9 FRANK GREGORY VASALLO, SR., No. C 05-5190 PJH (PR)  
10 Petitioner,  
11 vs.  
12 MENDOZA-POWERS, Warden,  
13 Respondent.  
14 /

15 This is a habeas corpus case filed pro se by a state prisoner pursuant to 28 U.S.C. §  
16 2254. The court ordered respondent to show cause why the writ should not be granted  
17 based on petitioner's three cognizable claims for relief. Respondent has filed an answer  
18 and a memorandum of points and authorities in support of it, and has lodged exhibits with  
19 the court. Although granted an opportunity to do so, petitioner has not filed a traverse. For  
20 the reasons set out below, the petition is denied.

21 **BACKGROUND**

22 Following a preliminary hearing in Alameda County Superior Court on December 10,  
23 2002, petitioner was charged with 61 counts of sexual abuse of a child. A jury trial ended in  
24 a mistrial, and the charges were amended to six counts of sexual abuse of a child. The jury  
25 convicted petitioner on all counts, and the trial court sentenced petitioner to a total term of  
26 fourteen years and eight months in state prison. This sentence consisted of the midterm of  
27 twelve years on Count 1 (continuous sexual abuse of a minor under Cal. Pen. Code §  
28 288.5(a)), consecutive terms of eight months each on Counts 3 (sodomy of a minor under

1 Cal. Pen. Code § 286(b)(2)), 4 (lewd act on a minor under Cal. Pen. Code § 288(c)(1)), 5  
2 (oral copulation with a minor under Cal. Pen. Code § 288a(b)(2)) and 6 (sodomy on a minor  
3 under Cal. Pen. Code § 286(b)(2)), and a stayed sentence on Count 2 (lewd act on a minor  
4 under Cal. Pen. Code § 288(c)(1)). The California Court of Appeal affirmed the judgment,  
5 and the petition for review to the California Supreme Court was denied.

6 Petitioner's son Frankie testified at trial that petitioner molested him over the course  
7 of approximately six years, between 1996 and 2002, starting when Frankie was nine years  
8 old.<sup>1</sup> Between 1996 and 1998, when his parents were separated, petitioner had sexual  
9 contact with Frankie during all of his overnight visitations with petitioner. Such contact  
10 included petitioner orally copulating him, and, at petitioner's direction, Frankie orally  
11 copulating and sodomizing petitioner. Frankie further testified that between 1999 and  
12 2002, after his parents reconciled and they were living together, petitioner engaged in  
13 sexual activity with him from two to five times per week. This contact involved Frankie  
14 orally copulating and sodomizing petitioner, and on one occasion, petitioner sodomized  
15 Frankie. Petitioner's stepson, Joey, also testified that petitioner had previously orally  
16 copulated him when he was 13, and had directed Joey to orally copulate and sodomize  
17 him. This activity continued until Joey moved out at age 17. Petitioner denied ever  
18 molesting Frankie or Joey.

#### 19 STANDARD OF REVIEW

20 A district court may not grant a petition challenging a state conviction or sentence on  
21 the basis of a claim that was reviewed on the merits in state court unless the state court's  
22 adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an  
23 unreasonable application of, clearly established Federal law, as determined by the  
24 Supreme Court of the United States; or (2) resulted in a decision that was based on an  
25 unreasonable determination of the facts in light of the evidence presented in the State court

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27 <sup>1</sup>This factual summary is from the background provided by the California Court of  
Appeal, which is not disputed by the parties. (Resp. Ex. 6 at 1-3.) A more detailed factual  
28 account is not necessary to resolve the claims raised in this petition.

1 proceeding." 28 U.S.C. § 2254(d). The first prong applies both to questions of law and to  
2 mixed questions of law and fact, *Williams (Terry) v. Taylor*, 529 U.S. 362, 407-09 (2000),  
3 while the second prong applies to decisions based on factual determinations, *Miller-El v.*  
4 *Cockrell*, 537 U.S. 322, 340 (2003).

5 A state court decision is "contrary to" Supreme Court authority, that is, falls under the  
6 first clause of § 2254(d)(1), only if "the state court arrives at a conclusion opposite to that  
7 reached by [the Supreme] Court on a question of law or if the state court decides a case  
8 differently than [the Supreme] Court has on a set of materially indistinguishable facts."  
9 *Williams (Terry)*, 529 U.S. at 412-13. A state court decision is an "unreasonable application  
10 of" Supreme Court authority, falling under the second clause of § 2254(d)(1), if it correctly  
11 identifies the governing legal principle from the Supreme Court's decisions but  
12 "unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The  
13 federal court on habeas review may not issue the writ "simply because that court concludes  
14 in its independent judgment that the relevant state-court decision applied clearly  
15 established federal law erroneously or incorrectly." *Id.* at 411. Rather, the application must  
16 be "objectively unreasonable" to support granting the writ. *Id.* at 409.

17 Under 28 U.S.C. § 2254(d)(2), a state court decision "based on a factual  
18 determination will not be overturned on factual grounds unless objectively unreasonable in  
19 light of the evidence presented in the state-court proceeding." *Miller-El*, 537 U.S. 322 at  
20 340; *see also Torres v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000).

21 When there is no reasoned opinion from the highest state court to consider the  
22 petitioner's claims, the court looks to the last reasoned opinion. *See Ylst v. Nunnemaker*,  
23 501 U.S. 797, 801-06 (1991); *Shackelford v. Hubbard*, 234 F.3d 1072, 1079, n. 2 (9th  
24 Cir.2000).

## 25 DISCUSSION

26 As grounds for habeas relief petitioner asserts that: (1) there was insufficient  
27 evidence to support his conviction on Count 2; (2) his due process rights were violated  
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1 when the trial court instructed the jury with CALJIC 2.50.2 and 2.50.01, regarding use of  
2 prior uncharged sexual offenses to establish guilt; and (3) his sentence was based on  
3 factors that were not decided by the jury.

4 **I. Count Two**

5 Petitioner claims that there was insufficient evidence to support his conviction on  
6 Count 2. In Count 2, petitioner was charged with committing a "lewd act upon a child" in  
7 violation of California Penal Code § 288(c)(1) between January 1, 2002 and June 30, 2002.  
8 The parties agree that only one such act was proved during that period of time, specifically  
9 sodomy. Petitioner argues that such an act cannot be the basis of his conviction on Count  
10 2 because it was the basis of his conviction on Count 3, which charged petitioner with  
11 committing sodomy upon a child, in violation of California Penal Code § 286(b)(2), during  
12 the same period, between January 1, 2002 and June 30, 2002.

13 Due process requires that there be sufficient evidence to have led a rational trier of  
14 fact to find guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 321, 324  
15 (1979). The California Court of Appeal rejected petitioner's claim because California law  
16 permits multiple convictions based on the same act, as long as there is not multiple  
17 punishment. (Resp. Ex. 6 at 3-5 (citing Cal. Pen. Code § 954, *People v. Pearson*, 42 Cal.  
18 3d 351, 354 (1986)).) Here, petitioner was convicted of both sodomy (Count 3) and  
19 commission of a lewd act on a minor (Count 2) based on the evidence of a single act of  
20 sodomy between January 1, 2002, and June 30, 2002. However, petitioner was only  
21 punished for Count 3, as his sentence on Count 2 was stayed pursuant to California Penal  
22 Code § 654. As petitioner did not receive multiple punishments, his convictions on both  
23 Counts 2 and 3 based on the single act of sodomy were authorized by California Penal  
24 Code § 954. (Resp. Ex. 6 at 5.)

25 Petitioner's insufficiency of evidence claim is premised on his interpretation of state  
26 law, which interpretation the state courts rejected. Specifically, petitioner argues that there  
27 was insufficient evidence to support his conviction on Count 2 because, contrary to the  
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1 interpretation of California law by the California Court of Appeal, California law does not  
2 authorize his conviction on Count 2 based on the same act of sodomy that was the basis  
3 for his conviction on Count 3. (Brief attached to Petition at 17-18.) However, a state  
4 court's interpretation of state law, including one announced on direct appeal of the  
5 challenged conviction, binds a federal court sitting in habeas corpus. *Bradshaw v. Richey*,  
6 546 U.S. 74, 76 (2005); *Hicks v. Feiock*, 485 U.S. 624, 629 (1988). Even a determination  
7 of state law made by an intermediate appellate court must be followed by a federal court on  
8 habeas review. *Id.* at 630 n.3. This court is bound by the interpretation of state law by the  
9 California Court of Appeal that petitioner could be convicted of both Counts 2 and 3 based  
10 on a single act of sodomy. Consequently, petitioner's claim that there was insufficient  
11 evidence of Count 2, premised on his contrary interpretation of California law , must be  
12 denied.

13 Accordingly, petitioner is not entitled to habeas relief on this claim.

14 **II. CALJIC Nos. 2.50.01 and 2.50.2**

15 Petitioner claims that the jury instructions on uncharged prior offenses, pursuant to  
16 the 2001 version of CALJIC Nos. 2.50.01 and 2.50.2, violated his right to due process.  
17 Petitioner argues that these instructions relieved the prosecution of its burden of proof  
18 beyond a reasonable doubt by allowing the jury to find facts regarding the prior offenses  
19 only by a preponderance of the evidence. The instructions given pursuant to CALJIC No.  
20 2.50.01, read as follows:

21 Evidence has been introduced for the purpose of showing that the  
22 defendant engaged in a sexual offense on one or more occasions other than  
that charged in the case.

23 If you find that the defendant committed a prior sexual offense, you  
24 may, but are not required to, infer that the defendant had a disposition to  
commit sexual offenses. If you find that the defendant had this disposition,  
you may, but are not required to, infer that he was likely to commit and did  
commit the crime or crimes of which he is accused.

25 However, if you find by a preponderance of the evidence that the  
26 defendant committed prior sexual offenses, that is not sufficient by itself to  
prove beyond a reasonable doubt that he committed the charged crimes. The  
weight and significance of the evidence, if any, are for you to decide.

27 Unless you are otherwise instructed, you must not consider this  
evidence for any other purpose.

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1 (Resp. Ex. 1, Clerk's Transcript ("CT") at 405 (quoting CalJIC No. 2.50.01 (2001 Rev.))).

2 CALJIC No. 2.50.2 defined the term "preponderance of the evidence." (CT at 406.)

3       The Due Process Clause of the Fourteenth Amendment protects the accused  
4 against conviction except upon proof beyond a reasonable doubt of every fact necessary to  
5 constitute the crime with which he or she is charged. *In re Winship*, 397 U.S. 358, 364  
6 (1970). This constitutional principle prohibits jury instructions that have the effect of  
7 relieving the State of its burden of persuasion beyond a reasonable doubt of every  
8 essential element of a crime. *Yates v. Evatt*, 500 U.S. 391, 400-03 (1991)

9       The Ninth Circuit has held that instructing the jury with the 1996 version of CALJIC  
10 Nos. 2.50.01 and 2.50.1 violates a defendant's right not to be found guilty except upon  
11 proof beyond a reasonable doubt. *Gibson v. Ortiz*, 387 F.3d 812, 822 (2004). This is  
12 because that version of 2.50.01 says that the jury may, but is not required to, infer from  
13 evidence of previous offenses that the defendant committed the crime with which he is  
14 charged, and 2.50.1 says that such previous offenses need be proved only by a  
15 preponderance of the evidence, not beyond a reasonable doubt. *Id.* at 821-22. Together,  
16 the instructions allow conviction by a preponderance, rather than requiring proof beyond a  
17 reasonable doubt. *Id.*

18       However, in this case petitioner was instructed with the 2001 revision of 2.50.01,  
19 which added the penultimate paragraph quoted above. The heart of the *Gibson* decision is  
20 the court's conclusion that the pre-revision instructions given in that case provided "two  
21 routes of conviction, one by a constitutionally sufficient standard and one by a  
22 constitutionally deficient one." 387 F.3d at 823. When it is impossible to know whether a  
23 jury used the impermissible legal theory or the one which meets constitutional  
24 requirements, the unconstitutionality of one of the routes requires that the conviction be set  
25 aside. *Id.* at 825. In this case, however, the constitutionally-deficient route was blocked off:  
26 The court instructed the jury in unequivocal words that it could *not* find petitioner guilty  
27 beyond a reasonable doubt just because it had found by a preponderance of the evidence  
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1 that he committed prior bad acts. The jury is presumed to have followed the instructions,  
2 *Weeks v. Angelone*, 528 U.S. 225, 234 (2000), and following the instructions it could not  
3 have taken the constitutionally-impermissible route to a guilty verdict. The *Gibson* court in  
4 fact took note of this revision of the instruction with approval. See *Gibson*, 387 F3d at 818.

5 Petitioner's due process rights were not violated. Because his rights were not  
6 violated, the state appellate courts' rejection of this claim was not contrary to, or an  
7 unreasonable application of, clearly established United States Supreme Court authority.  
8 Accordingly, petitioner is not entitled to habeas relief on this claim.

9 **III. Sentence**

10 Petitioner claims that the trial court violated his Sixth Amendment right to a jury by  
11 ordering sentences on Counts 3 to 6 to run consecutively based on factors not decided by  
12 a jury. The trial court based its decision to run the sentences consecutively on six factors:  
13 (1) the crimes and objectives were independent of each other; (2) the crimes involved  
14 separate acts exceeding a period of six years; (3) the crimes occurred at various times and  
15 locations; (4) there was a high degree of callousness; (5) the victim was vulnerable; and (6)  
16 the defendant took advantage of a position of trust. (RT, Aug. 18, 2003, at 5-6.) Petitioner  
17 claims that under *Blakely v. Washington*, 542 U.S. 296 (2004), the trial court was not  
18 authorized to impose consecutive terms based on factors that were not found by a jury.

19 "Other than the fact of a prior conviction, any fact that increases the penalty for a  
20 crime beyond the prescribed statutory maximum must be submitted to a jury, and proved  
21 beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 488-90 (2000). The  
22 "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge could  
23 impose based solely on the facts reflected in the jury verdict or admitted by the defendant;  
24 that is, the relevant "statutory maximum" is not the sentence the judge could impose after  
25 finding additional facts, but rather is the maximum he or she could impose without any  
26 additional findings. *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004). However, the  
27 Constitution does not require a jury to determine facts that do not extend the sentence  
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1 beyond the statutory maximum, even if these facts may have a substantial impact on the  
2 sentence. *Harris v. United States*, 536 U.S. 545, 554-68 (2002).

3        *Apprendi* and *Blakely* involved the enhancement of a sentence on a single count,  
4 and did not involve the decision challenged here, namely to impose consecutive sentences  
5 on multiple counts. In *United States v. Fifield*, 432 F.3d 1056 (9th Cir. 2005), the Ninth  
6 Circuit held that a federal sentencing court's decision to run sentences consecutively under  
7 18 U.S.C. § 3854 without consulting a jury does not violate the Sixth Amendment. *Id.* at  
8 1067. The court explained that the *Apprendi-Blakely* line of cases does not prohibit the trial  
9 court from making any factual findings: "Judicial factfinding does not, on its own, violate the  
10 Sixth Amendment, even when that factfinding is the basis for enhancing a defendant's  
11 sentence." *Id.* at 1066. The court reasoned that "[b]ecause, under § 3584, a district court  
12 need not find any particular fact to impose consecutive sentences, the imposition of  
13 consecutive sentences does not violate the Sixth Amendment." *Id.* at 1067. Other circuits  
14 have also held that the Sixth Amendment does not prohibit the trial court from deciding to  
15 impose consecutive sentences on multiple counts based on facts not found by a jury. See  
16 *United States v. Hicks*, 389 F.3d 514 532 (5th Cir. 2004); *United States v. Lafayette*, 337  
17 F.3d 1043, 1049-50 (D.C. Cir. 2003).

18        Under California law, as under federal law, the trial judge has discretion to run  
19 sentences on multiple counts concurrently or consecutively, and the trial court "may"  
20 consider a number of criteria "affecting" its decision. Cal. R. Ct. 4.425 (listing criteria to be  
21 considered by trial court); see also Cal. Pen. Code § 669. Like the federal sentencing  
22 provision at issue in *Fifield* (18 U.S.C. § 3584), California "instructs courts to consider the  
23 factors spelled out [] in deciding whether to impose concurrent or consecutive sentences,"  
24 but does not "require that a court find any particular facts before imposing consecutive  
25 sentences." *Fifield*, 432 F.3d at 1067; see Cal. R. Ct. 4.425. Because a California court  
26 need not find any particular facts in deciding to run a sentence consecutively, the  
27 imposition of consecutive sentences in this case does not run afoul of the Sixth  
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1 Amendment. *Accord id.* As there was no constitutional violation, the state courts' rejection  
2 of this claim was neither contrary to nor an unreasonable violation of federal law.  
3 Accordingly, petitioner is not entitled to habeas relief on this claim.

4 **CONCLUSION**

5 For the foregoing reasons, the petition for a writ of habeas corpus is **DENIED**. The  
6 clerk shall close the file.

7 **IT IS SO ORDERED.**

8 Dated: 2/2/09



9 **PHYLLIS J. HAMILTON**  
United States District Judge